NO. 43896-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

KEITH KEVIN HORNADAY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 11-1-01051-0

BRIEF OF RESPONDENT

RUSSELL D. HAUGE
Prosecuting Attorney

RANDALL A. SUTTON
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

SERVICE		
	Eric J. Nielsen 1908 E Madison Street Seattle, Wa 98122-2842 Email: nielsene@nwattorney.net	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. *or, if an email address appears to the right, electronically.* . I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED August 1, 2013, Port Orchard, WA **Original e-filed at the Court of Appeals; Copy to counsel listed at left.**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTORY AUTHORITIES

RULES

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Hornaday fails to show that the trial court's instruction that incorrectly defined recklessness was manifest constitutional error ?

2. Whether even if the error were of constitutional magnitude and manifest, it would be harmless?

3. Whether Hornaday fails to show prejudice flowing from trial counsel's failure to object to the instruction?

4. Whether the term of community custody specified in the judgment and sentence for Counts II through VIII must be corrected? [Concession of Error]

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Keith Hornaday was convicted by a jury of second-degree assault, witness tampering, and six counts of felony violation of a court order. CP 144. The trial court imposed an exceptional sentence totaling 133 months, based on the multiple current offenses aggravating circumstance under RCW 9.94A.535(2)(c). CP 147, 156-57.

B. FACTS[1]

Christine Perry, an emergency room physician at Harrison Medical Center in Bremerton, treated Yvonne Klepper[2] early in the morning on October 31, 2011. 3RP 296, 299.[3] Klepper reported that she had been assaulted by her ex-boyfriend. 3RP 299.

Based on the reported assault, Perry requested a CAT scan of Klepper's head and neck. 3RP 302. Klepper had multiple contusions (bruises) to her face and a tooth had been knocked out. 3RP 302. She also had abrasions to her face and was complaining of neck pain. 3RP 302.

The doctor went through the photographic exhibits with the jury. Exhibit 1 showed a contusion or bruising to the lower lip and an abrasion to the bridge of her nose. 3RP 303.

Exhibit 2 showed an abrasion to the side of Klepper's nose. 3RP 304. Also, on the right side of her neck there appeared to be a strangulation-type injury. 3RP 304. She was tender to the touch but did not show any evidence of blood vessels breaking on the right side of the neck. 3RP 304.

---

[1] Because Hornaday only assigns error to his second-degree assault charge, the factual summary is limited largely to the evidence concerning that charge.

[2] Klepper's full legal name is Yvonne Joy Newsted-Klepper. She commonly went by the name Joy Hornaday. 2RP 178. For clarity and simplicity she will be referred to herein as "Klepper."

[3] The State will use the same notation for the reports of proceedings as Hornaday. *See* Brief of Appellant, at 2 n.1.

Perry explained that there were many injuries that she would expect to see in a strangulation case, depending on the strength and duration of the pressure held. 3RP 304. It was possible for there to be no visible injury. 3RP 304. Perry would also look for evidence of any tracheal damage, which was not present in Klepper's case. 3RP 305.

If enough pressure were held, broken blood vessels would be visible on the skin's surface. 3RP 304. These are called petechiae, which are microscopic blood vessels that are broken, causing the blood to leak to the surface. 3RP 305. There were no petechiae on the right side of her neck, but there were on the left, as shown in Exhibit 3. 3RP 305-06. The injuries could be consistent with strangulation. 3RP 306.

Exhibit 3 also showed a small abrasion to the left side of Klepper's mouth. 3RP 305. It additionally showed an abrasion on her nose. 3RP 305.

Exhibit 4 showed bruising to Klepper's tongue. 3RP 306. It could have been from biting her tongue or having been struck. 3RP 306. Klepper was unable to identify when it occurred, other than that it had not been there before the assault. 3RP 306.

Exhibit 5 showed a contusion to her right upper lip. 3RP 306.

Exhibit 6 showed Klepper's left arm, where she had been held

while he was hitting her. 3RP 307. Exhibits 7 also showed bruising to her arm. 3RP 307.

Exhibit 8 showed an injury to her left knee. 3RP 307.

Klepper was also treated by Cynthia Mason, an ER nurse at Harrison. 4RP 399. Klepper told also Mason that told me that she was assaulted by her ex-boyfriend, and that she was hit and choked to passing out. 4RP 401. She was complaining of headache, neck pain, bilateral shoulder pain, elbow pain and other multiple complaints. 4RP 401. Mason noted scratches to her nose, forehead, red marks to her neck and some swelling and bruising to the right side of her mouth. 4RP 401.

Mason noted that Klepper arrived at 1:56 a.m. 4RP 402. The chart indicated that she was not having any difficulty breathing. 4RP 403.

Bremerton Police Officer Bryan Hall received a call to report to the hospital at 2:45 a.m. 2RP 105-107. He arrived at the hospital at 3:00 a.m. 2RP 107. He contacted Klepper and Erik McSheperd, whom Klepper identified as her boyfriend, in an ER room. 2RP 107. Klepper had fairly significant injuries to her face. 2RP 107. She was upset and crying. 2RP 108.

Hall took the photos of the injuries that the doctor discussed. Around 3:30 the next morning, Hall located Hornaday and arrested him.

2RP 113. At the time he was arrested, Hornaday had a scratch on his forehead about three-quarters of an inch long. 2RP 113.

Klepper considered Hornaday her husband, although they were not legally married. 2RP 179. Klepper had known Hornaday for about three years. They were "married" in September 2011. 2RP 182.

Klepper had just moved into an apartment in Bremerton with Sunday, who was her friend. 2RP 183-84. That evening, Klepper and Hornaday got into an argument that turned into a fight. 2RP 183.

Hornaday was upset because Klepper had spent the night before with her girlfriend. 2RP 197. Klepper told Hornaday to leave. 2RP 184. They got into a fist-fight in the apartment and her glasses were broken. 2RP 184, 197. Hornaday eventually left. 2RP 184.

Klepper subsequently left the apartment to go to the 7-Eleven. As she was walking down the alley toward the store,[4] she was attacked from behind. 2RP 184, 198. She remembered seeing Hornaday's face, but did not recall the specifics.[5] 2RP 184. She recalled him being in the alley. 2RP 184. She did not remember "if it was exactly him in the alley." 2RP 185. She was choked and punched in the mouth and lost a tooth. 2RP

---

[4] On cross examination Dr. Perry testified that Klepper told her that she was assaulted in an alley after she had gotten out of her car and was walking home. 3RP 307-08.

[5] Klepper told Perry that the assailant was an ex-boyfriend with whom she had broken up a few months earlier. 3RP 308.

185. She lost consciousness because her skull plate was fractured. 2RP 185. The plate was from when she was hit by a van at age five. 2RP 185. That was why she could not remember the details.[6] 2RP 185.

She did not see anyone else in the alley. 2RP 197. Hornaday had a scratch on his face from their prior altercation. 2RP 197.

After the assault she ran to the home of her brother, Christopher Smith, and woke up her "lover," Erik McSheperd. 2RP 162, 185. Hornaday knew about McSheperd. 2RP 185. Smith and McSheperd went out on the porch while her sister-in-law put ice on her face. 2RP 186. Klepper did not recall what happened next. 2RP 186.

She next recalled being at the hospital. McSheperd and two others took her to the hospital. 2RP 186. She did not recall taking a shower before going to the hospital. 2RP 186. At the hospital she was given a CAT scan and x-rays, and an officer took her statement. 2RP 186. She lost teeth, had a black eye and stiches to her head. 2RP 187.

On cross-examination, defense counsel questioned Klepper's honesty, and pointed out her prior convictions, and that she was testifying under material witness warrant. 2RP 199, 211. She admitted that she did not plan to come to court. 2RP 200. She could not recall if she told the

---

[6] Perry confirmed that Klepper told her that she had a plate as a result of a craniotomy. 3RP 309. Perry also confirmed that it could affect memory. 3RP 310.

defense investigator that she had no intention of testifying. 2RP 201.

She told people in November 2011 that she was pregnant with Hornaday's child. 2RP 201. She had subsequently had a miscarriage. 2RP 201.

She had eight children. 2RP 202. Winter was a child that she miscarried in July of 2011. 2RP 202.

She graduated from Penn State. 2RP 204. She had degrees in child psychology, human development and family studies and special needs. 2RP 204.

Klepper used methamphetamine a few times a week, but had not used in the 48 hours before the assault. 2RP 207.

The girlfriend they were arguing about was Dawn Hall. 2RP 210. It was a romantic relationship. 2RP 210. She had several other romantic relationships besides Hall, McSheperd and Hornaday. 2RP 210.

Klepper had previously described her relationship with Hornaday as "fighting and fucking." 3RP 219. They argued because they liked makeup sex. 3RP 219. She also admitted stating that that they had gotten into "some knock-out, drag-out fist fights, many, many, many, many, not all started by him." 3RP 220. She also acknowledged as true that she had said that "Like, that's just what we would do. We would fight and fuck.

That's what we did all the time. We'd beat the shit out of each other." 3RP 220.

Klepper admitted that she was angry with Hornaday on the day of the assault because he told her he was cheating on her. 3RP 221. However, she insisted the altercation on October 30 was about her being with Dawn Hall. 3RP 221.

She had been living in the upstairs apartment with both Hornaday and McSheperd. 3RP 221. She moved downstairs with Sunday because she was tired of the two of them fighting over her. 3RP 221.

Klepper admitted that to some extent she used the threat of jail to manipulate Hornaday. 3RP 223. She denied ever having made up allegations, however. 3RP 223.

The police were called in August because Hornaday had burst into her motel room without permission and assaulted her. 3RP 224. She denied that she had lied to the police then to get Hornaday arrested. 3RP 225.

She admitted that during one of the jail phone calls she said to Hornaday, "Look, you put your dirty dick in too many bitches, when we were together. You keep fucking lying to me, and I'm fucking done with that." 3RP 226.

In another call Klepper told Hornaday, "I'm testifying. I'm giving the interview. I am for your wife" (referring to herself in the third person). "I am for your wife, because she is so disgusted and sickened by your fucking lies. She's tired of being hurt, and she's tired of being lied to." 3RP 226. She also told him ""If you're not going to tell me the truth, then you have no fucking chance in hell. You're going to fucking prison for a long motherfucking time." 3RP 227. In that call, she continued, "I don't ever want to talk to you again. I will see you on the 18th, when I testify against you." Hornaday responded, "Oh, my God. You're really trying to get me in trouble, aren't you? You're really trying to get me." Klepper then replied, "Because you won't tell me the fucking truth. And I already know the truth, but you won't fucking tell me." 3RP 227.

Klepper wrote a letter to Hornaday in April 2011. 3RP 228. In the letter she explained that she had been with McSheperd to get revenge for Hornaday being with another woman. 3RP 229. In the letter she also told Hornaday, "I know what's been done I can never undo. And the only way I can keep your dick out of that ugly fucking slut is to keep you in jail. You can never be just mine. You will always cheat and lie and abuse. But I love you always." 3RP 229.

Klepper did not recall whether she told the officer at the hospital about the fight inside the apartment. 3RP 230. Defense counsel suggested

that said in her pre-trial interview that there had not been an altercation in Sunday's apartment. 3RP 235. Klepper pointed out that in fact her answer had been that she did not remember. 3RP 235. She explained that because of the injury to the plate, her memory was coming back in bits and pieces. 3RP 235.

Klepper also said in the interview that she did not recall whether or not Hornaday assaulted her in the alley. 3RP 231, 236. She was asked whether she remembered seeing Hornaday in the alley, and responded that she was alone. 3RP 231. She explained that she meant that when she regained consciousness she was alone. 3RP 233.

Klepper admitted that after waking up in the alley, she first ran to get McSheperd. 3RP 237. Then she took a shower. 3RP 237. She did not call 911 because she did not like dealing with the police. 3RP 237. She did not want to go to the hospital, but McSheperd talked her into it because her mouth would not stop bleeding. 3RP 238.

Klepper denied calling Hornaday's probation officer on July 29. 3RP 241. She stated that it was Christy Edridge who called, pretending to be her. 3RP 241-42. Klepper had just had a miscarriage and was sick; she was not talking to anyone. 3RP 242.

On redirect, Klepper testified that in the August incident, Klepper truthfully reported that Hornaday had come into the room and beaten her

up. 3RP 291.

She remembered what had happened when she was at the hospital, but her memories did not last very long. 3RP 292. She took the shower to get the blood off of her. 3RP 292.

When she said she was alone in the alley, she meant when she left to go to the store. 3RP 293. Before she was assaulted she saw Hornaday. 3RP 293. He shoved her glasses into her face and the lenses popped out. 3RP 293. After that she could not see much. 3RP 293.

She was testifying at trial because she did not want him to beat her up anymore. 3RP 294.

The defense called defense investigator James Harris. 4RP 371. Harris testified that he contacted Klepper on November 15, 2011, to determine whether she would be available for an interview. 4RP 373. He spoke with her for a few minutes. 4RP 374. Klepper volunteered that she was not going to testify or appear in court. 4RP 375. Klepper also told Harris that Hornaday pushed her and she punched him in the face, and that was the extent of the assault. 4RP 375-76.

A formal recorded interview was held on March 8, 2012, at the jail. 4RP 376. Klepper was asked whether there was an altercation in Sunday's apartment. 4RP 380. Klepper responded, "Not that I

remember." 4RP 381. There was no other reference in the interview to that altercation. 4RP 381.

Hornaday called his probation officer, who testified that Klepper called her on July 29. 4RP 416. The officer recognized Klepper's voice. 4RP 417.

Hornaday's final witness was Klepper's brother Christopher Smith. Smith's apartment was just above Sunday's. 4RP 427. After Klepper moved in with Sunday, Hornaday alternated between staying with Klepper and with Smith. 4RP 428. McSheperd was also staying at Smith's. 4RP 428.

On the night of the assault, Smith heard Klepper and Hornaday arguing around 10:00 p.m. 4RP 428. He did not hear what they were arguing about, but most of their arguments were about "stupid, common relationship stuff." 4RP 429. He and McSheperd went out on their porch to have a cigarette and see what the commotion was about. 4RP 429. They talked about whether they should intervene, but McSheperd said they were grown adults, so they went back inside. 4RP 430.

Next thing, Klepper came running up the stairs. 4RP 430. She asked to use his phone, and said she was trying to get ahold of Hornaday. 4RP 430. He was gone; she said he went down the alley. 4RP 430.

Hornaday would not answer and she kept leaving messages. 4RP 430. Then he saw Hornaday come down the alley. 4RP 430. Klepper went back downstairs and they began arguing again. 4RP 430. Then Hornaday left and went back down the alley. 4RP 431. Smith went back inside. 4RP 431.

Klepper came back up to use the phone, and then left with McSheperd. 4RP 432. Klepper seemed really irritated, but she did not have any blood on her. 4RP 432. They left before 11:00 p.m., and did not return until around 1:00 a.m. 4RP 432. She was still with McSheperd when she came back. 4RP 432. At that point she asked to use the phone to get a ride to the hospital. 4RP 432.

On cross by the State, Smith also said that he did not see anything wrong with Klepper the last time she came back. 4RP 433. Her friend James Garden came to get her. 2RP 196, 4RP 434. Smith did not know if McSheperd went with them to the hospital. 4RP 434.

III. ARGUMENT

A. HORNADAY FAILS TO SHOW MANIFEST CONSTITUTIONAL ERROR WARRANTING REVIEW OF THE RECKLESSNESS DEFINITIONAL INSTRUCTION FOR THE FIRST TIME ON APPEAL, AND THE ERROR WOULD, IN ANY EVENT, BE HARMLESS, WHERE RECKLESSNESS WAS NOT AN ISSUE AT TRIAL.

Hornaday argues for the first time on appeal that the trial court erred when it improperly defined "reckless" in the jury in Instruction 13. This claim is without merit because Hornaday fails to show manifest constitutional error warranting review for the first time on appeal, and because the error would, in any event, be harmless.

Instruction 13 informed the jury that a person "acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur..." CP 92. Hornaday correctly notes that in *State v. Harris*, 164 Wn. App. 377, ¶ 22, 263 P.3d 1276 (2011), this Court held that in the context of an assault, the phase "wrongful act," which appears in the WPIC, must be replaced with the injury specified under the statute. In *Harris*, a first degree assault of a child case, the instruction should have read "great bodily harm." Here, it should have included the phrase "substantial bodily harm." RCW 9A.36.021(1)(a).

In *Harris*, however, the defendant proposed the correct instruction at trial. *Harris*, 164 Wn. App. at ¶ 13. Here, on the other hand, when

asked, Hornaday specifically stated that he had no objection to Instruction 13. 4RP 451. As such, he must show manifest constitutional error before he may raise this issue on appeal.

1. Hornaday fails to show manifest constitutional error.

RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them. *State v. Guzman Nuñez*, 160 Wn. App. 150, 157, 248 P.3d 103 (2011) (*citing State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988)), *aff'd*, 174 Wn.2d 707 (2012). Hornaday argues that this claimed error may be raised for the first time on appeal under an exception to the general rule provided by RAP 2.5(a)(3), which permits a party to raise initially on appeal a claim of "manifest error affecting a constitutional right."

To demonstrate "manifest error affecting a constitutional right," an appellant must demonstrate (1) the error is truly of constitutional dimension and (2) the error is manifest. *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). Specifically, "the appellant must 'identify a constitutional error and show how the alleged error actually affected the [appellant]'s rights at trial.'" *Id.* (alteration the Court's) (*quoting State v. Kirkman*, 159 Wn.2d 918, 926–27, 155 P.3d 125 (2007)). If the Court finds that the trial court committed a manifest constitutional error, it may still be subject to a harmless error analysis. *Kirkman*, 159 Wn.2d at 927.

a. An erroneous definitional instruction is not of constitutional magnitude.

This Court does not assume that an alleged error is of constitutional magnitude. *Scott*, 110 Wn.2d at 687. Instead, it looks to the asserted claim and assesses whether, if correct, it implicates a constitutional interest as compared to another form of trial error. *See Scott*, 110 Wn.2d at 689-91; *O'Hara*, 167 Wn.2d at 98.

Hornaday's assertion of manifest error affecting a constitutional right fails at this first step; the trial court's erroneous definitional instruction does not implicate a constitutional interest. The failure to instruct the jury on every element of the charged crime amounts to constitutional error. *State v. Gordon*, 172 Wn.2d 671, 677, 260 P.3d 884 (2011); *O'Hara*, 167 Wn.2d at 105 ("Due process requires a criminal defendant be convicted only when every element of the charged crime is proved beyond a reasonable doubt."). If the instruction properly informs the jury of the required elements, however, any failure to further define terms used in the elements is not an error of constitutional magnitude.[7] *Gordon*, 172 Wn.2d at 677 (*quoting State v. Stearns*, 119 Wn.2d 247, 250, 830 P.2d 355 (1992)); *O'Hara*, 167 Wn.2d at 105 (*quoting State v. Fowler*, 114 Wn.2d 59, 69–70, 785 P.2d 808 (1990), *overruled on other grounds by State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991)).

[7] Hornaday does not claim that Instruction 14, the to-convict instruction for second-degree assault (CP 93), was incorrect or omitted any element.

In *Scott*, the Supreme Court was asked whether the trial court's failure to define "knowledge" for the jury was constitutional error. *Scott*, 110 Wn.2d at 683-84. The Court acknowledged that *State v. Tyler*, 47 Wn. App. 648, 736 P.2d 1090 (1987), *overruled by State v. Delcambre*, 116 Wn.2d 444, 805 P.2d 233 (1991), interpreted its decision in *State v. Allen*, 101 Wn.2d 355, 678 P.2d 798 (1984), as having held that there is a constitutional requirement that a court define mental states. *Scott*, 110 Wn.2d at 684. The Supreme Court clarified *Allen* as dealing only with the technical term rule: that a party is entitled to have a technical term defined upon request. "*Allen* does not support [the] contention that the failure to define a technical term in an instruction is constitutional error that may be raised for the first time on appeal." *Scott*, 110 Wn.2d at 690; *see also O'Hara*, 167 Wn.2d at 106–07 (holding that the trial court's failure to define "malice" did not constitute error of a constitutional magnitude); *State v. Stearns*, 119 Wn.2d 247, 250, 830 P.2d 355 (1992) (as long as the instructions properly inform the jury of the elements of the charged crime, any error in further defining terms used in the elements is not of constitutional magnitude; *State v. Lord*, 117 Wn.2d 829, 880, 822 P.2d 177 (1991) (even an error in defining technical terms does not rise to the level of constitutional error).

The same reasoning by which the court has determined that a

failure to properly define "knowledge" and "malice" is not constitutional error applies here. Absent constitutional error, the Court need not analyze whether any error was manifest or harmless. *Gordon*, 172 Wn.2d at ¶ 13. RAP 2.5(a) applies, and the Court should decline to review this claim.

b. The alleged error is not manifest.

Even were the erroneous instruction constitutional error, it could not be considered manifest. An error is manifest if it had practical and identifiable consequences in the case. *State v. Schaler*, 169 Wn.2d 274, 284, 236 P.3d 858 (2010) (*citing O'Hara*, 167 Wn.2d at 99). This standard is also referred to as "actual prejudice." *Id.* As the Supreme Court explained:

> [T]he focus of the actual prejudice [analysis] must be on whether the error is so obvious on the record that the error warrants appellate review.... Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

O'Hara, 167 Wn.2d at 99–100, 217 P.3d 756 (citation and footnote omitted). This analysis is distinct from the harmless error analysis. *Schaler*, 169 Wn.2d at 284 (citing O'Hara, 167 Wn.2d at 98). Where a defendant fails to show that the error pertained to any issue actually present at trial, the error is not manifest. *State v. Ballew*, 167 Wn. App. 359, ¶ 39, 272 P.3d 925, *review denied*, 175 Wn.2d 1019 (2012) (failure to include "idle talk or jokes" language in true-threat definitional instruction

was not manifest where there was no evidence that the threat was idle talk or a joke).

Here, whether the assault was reckless, *i.e.* was simply not in issue at trial. The entire defense was that Klepper was lying and/or simply not credible, and that the State had failed to prove that Hornaday was the assailant:

> And then, if you go to the top of Page 2 of instruction Number 1, there's a paragraph there about credibility. And this paragraph is so important, in this case, because this case ultimately comes down to credibility.
>
> * * *
>
> So each of these elements have to be proved beyond a reasonable doubt. And so when you go through and you evaluate this case, in light of the burden of proof, and you say to yourself, Am I convinced beyond a reasonable doubt that Mr. Hornaday assaulted Yvonne Klepper in that alley and either inflicted substantial bodily harm, or he strangled her? And I would submit to you, based upon the credibility of Ms. Klepper, that you cannot establish beyond a reasonable doubt that that is true.

5RP 509, 527. A review of Hornaday's closing argument bears this out.

His primary theme was that Klepper was not credible and a liar. 5RP 508, 509-10, 511-18, 520-23, 525, 527, 529. He also argued that Klepper was seeking revenge against Hornaday because he cheated on her, and that she would have testified to anything to be freed from jail, where she was incarcerated under a material witness warrant. 5RP 519-21.

He finally argued that Klepper never positively identified

Hornaday as her assailant. 5RP 510-11. And that her "lover" McSheperd did it. 5RP 511, 524.

Moreover, the State did not take advantage of the deficient instruction, and instead tied recklessness directly to the injuries Klepper suffered:

> And the next thing the State has to prove for that element is that these injuries were inflicted -- that they were caused by an intentional assault and that -- which recklessly caused the injuries. So you have three different instructions to explain what the words intent, assault, and reckless mean.
>
> * * *
>
> The last part of this element that the State has to prove is that the injuries were caused recklessly. And then you have an instruction that talks about recklessly and tells you that it's a -- it's when a person disregards a substantial risk that wrongful acts would occur in gross deviation -- and that's a gross deviation from conduct of a reasonable person.
>
> Well, in this case, we have that. He tackled her to the ground. We have that he punched her. He strangled her. He caused a broken tooth. And many of these things are within the medical records. And that certainly is reckless. And because of this reckless behavior, she did receive substantial injuries. And so the State has met its burden on that particular element.

5RP 478-480.

In addition to his closing, in both his cross of the State witnesses and in his own case-in-chief, Hornaday hammered on the same themes he presented in his argument. The evidence is more fully laid out in the statement of the facts, *supra*, but the following are the highlights.

Hornaday began his cross with an attack on Klepper's honesty and an exploration of her criminal record. 2RP 199-201, 211. He went into a number of subjects that were of questionable relevance, but which could be seen as calling into question Klepper's general fitness as a person, such as claims that she was pregnant with Hornaday's child, that she had eight children, her methamphetamine use, her purported educational achievements, and her sexual proclivities and activities. 2RP 201-02, 204-07, 210, 219-20.

He also engaged in extensive discussion of her relationship with Hornaday and elicited an agreement that she was manipulative. 3RP 219-23, 241. He attempted to get her to admit that she was pursuing the assault charge out of revenge and to control Hornaday. 3RP 224-29.

Hornaday focused repeatedly on alleged discrepancies between Klepper's statements at the hospital, to police, in defense interviews and in court. 3RP 230-33, 308. He also presented impeachment witnesses to corroborate the discrepancies. 4RP 381, 416-17.

Hornaday also elicited evidence that McSheperd was arrested for a second-degree domestic violence assault, that was reduced to a conviction for fourth-degree DV assault. 4RP 394.[8] He capitalized on the medical reports, which indicated that Klepper claimed she had been assaulted by her "ex-boyfriend" that she had broken up with months earlier. 3RP 308.

In further support of the McSheperd-did-it theory, Hornaday called Klepper's brother to testify about the night of the assault. According to his testimony, Hornaday and Klepper argued several times that evening, but then Hornaday left. 4RP 428-31. Klepper then left with McSheperd, and came back (again with McSheperd) at which time she sought to use his phone to get a ride to the hospital. 4RP 432.

Throughout all his argument, all his cross-examination, and all his case-in-chief, Hornaday *never* challenged either the severity of Klepper's injuries, or raised whether the assailant was reckless or not. Under these circumstances recklessness was simply not in issue, and the error is not manifest.

---

[8] Hornaday also sought three times to introduce, as "other suspect" evidence and under ER 404(b), that Klepper was the victim of this assault, and that it involved strangulation. 3RP 245; 4RP 388; 4RP 435. The final time, the trial court granted the motion. 4RP 443-44. When the court also held that the evidence would open the door to a similar assault by Hornaday that occurred two months before the instant assault, Hornaday decided not to pursue the evidence. 4RP 446-47.

c. The error, even if constitutional and manifest, would be harmless.

Moreover, even if the court were to consider the claimed error, it would be harmless. Even when a jury instruction misstates an essential element of crime (as opposed to a definition as in this case), the error is harmless if that element is supported by uncontroverted evidence. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002); *see also Ballew*, 167 Wn. App. at ¶ 27 (erroneous true-threat definitional instruction was harmless where based on the evidence a reasonable trier of fact could have found the requisite mental state).

As discussed previously, whether the assailant acted recklessly was simply not an issue at Hornaday's trial. *Cf. Harris*, 164 Wn. App. at ¶ 19 (defense attempt to argue that the State had not proven that the defendant knew of and disregarded a substantial risk that his actions would cause great bodily harm was prevented by trial court showed prejudice). Nor was there any evidence that suggested that the assailant was not reckless.

The only evidence at trial truly bearing on the issue was the nature of Klepper's injuries. Moreover, this was the only evidence that was not subject to Hornaday's repeated claims of bias, lies and incredibility. Indeed, in closing, Hornaday specifically disavowed any attack on the credibility of the law enforcement or medical witnesses:

> You know, you heard from some police officers and

> some medical personnel. And I don't think that you have any real doubts as to their credibility. My cross examinations of the professional witnesses were relatively short. And most of the professional witnesses I wanted to bring out one or two points, and I sat down. I didn't attack the credibility of any professional witnesses.

5RP 509.

The responding officer and the treating physician described Klepper as having fairly significant injuries. Her lips were bruised, her neck was bruised, her arms and knee were bruised, and she had an abrasion to the side and bridge of her nose, and to her mouth. She had a broken tooth and bruised tongue. She bore signs of having been strangled. 2RP 107-12; 3RP 302-

Hornaday minimizes this evidence, concluding that Klepper's "injuries are a far cry from 'substantial bodily harm' at its most extreme." Brief of Appellant, at 11. The State is unsure what to make of this statement. Recklessness only requires that knowledge and disregard of "a substantial risk" that substantial bodily harm might occur. Hornaday's citation, *id.*, to precedent addressing an aggravating circumstance is thus also perplexing. Moreover, it is absurd to argue, as trial counsel apparently recognized, that delivering a beating that resulted in cuts and bruises to the victim's face, neck, arms and leg, and a broken tooth would not cause someone to be aware of a substantial risk of substantial bodily harm, *i.e.*, "bodily injury which involves a temporary but substantial

disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part." RCW 9A.04.110(4)(b).

Hornaday also argues that the injury could have been caused by a fall resulting from a push or shove. Brief of Appellant, at 10. Again, pushing or shoving someone to the pavement clearly involves a substantial risk of inflicting substantial bodily harm. This claim should not be considered, and even if it were, it should be rejected as harmless error.

2. Hornaday fails to show ineffective assistance of counsel.

Apparently recognizing that his claim was not preserved for appellate review, Hornaday also argues that counsel was ineffective for no objecting to Instruction 13. He fails however to show prejudice.

In order to overcome the strong presumption of effectiveness that applies to counsel's representation, a defendant bears the burden of demonstrating both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *see also Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either part of the test is not satisfied, the inquiry need go no further. *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

To show prejudice, the defendant must establish that "there is a

reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Hendrickson*, 129 Wn.2d at 78; *Strickland*, 466 U.S. at 687.

The State would concede that counsel was deficient in not objecting to Instruction 13. Nevertheless, this claim fails because Hornaday cannot show that a correct instruction would have led to an acquittal. For the same reasons, discussed *supra*, that the error is not manifest and would be harmless, Hornaday fails to establish prejudice.

Contrary to Hornaday's contention, Brief of Appellant, at 15, the inability of the jurors to unanimously agree on the strangulation prong does not indicate that a different definitional instruction would have resulted in different outcome. The doctor's testimony regarding whether Klepper was actually strangled was weak.[9] By contrast, as previously discussed, her injuries spoke for themselves. This claim should be denied.

---

[9] Q. And the injuries that you saw on Ms. Klepper, were they consistent with a person who had been strangled?

A. They can be, yes, ma'am.

3RP 306.

B. HORNADAY'S JUDGMENT SHOULD BE CORRECTED TO COMPORT WITH RCW 9.94A.701(9).

Hornaday next claims that the trial court erred in imposing terms of confinement and community custody that together exceeded the 60-month statutory maximum for the offenses in Counts II through VIII. He is correct.

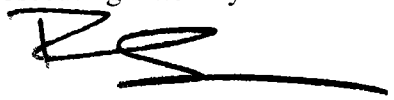
Pursuant to *In re Brooks*, 166 Wn.2d 664, 211 P.3d 1023 (2009), the court included a notation on the judgment and sentence stating that the total term of confinement and community custody could not exceed the statutory maximum. CP 148. Following the 2009 amendment to what is now RCW 9.94A.701(9), "the '*Brooks* notation' procedure no longer complies with statutory requirements" as to defendants sentenced after July 26, 2009. *State v. Boyd*, 174 Wn.2d 470, ¶¶ 4-5, 275 P.3d 321 (2012). The matter should be remanded for correction of the judgment and sentence.

IV. CONCLUSION

For the foregoing reasons, Hornaday's conviction should be affirmed and the matter remanded for correction of the judgment and sentence.

DATED August 1, 2013.

Respectfully submitted,
RUSSELL D. HAUGE
Prosecuting Attorney



RANDALL A. SUTTON
WSBA No. 27858
Deputy Prosecuting Attorney

KITSAP COUNTY PROSECUTOR

August 01, 2013 - 4:11 PM

Transmittal Letter

Document Uploaded: 438968-Respondent's Brief.pdf

Case Name: STATE OF WASHINGTON VS KEITH KEVIN HORNADAY

Court of Appeals Case Number: 43896-8

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Lori A Vogel - Email: **lvogel@co.kitsap.wa.us**